

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

IN RE: METHYL TERTIARY BUTYL  
ETHER ("MTBE") PRODUCTS  
LIABILITY LITIGATION

MDL 1358  
00 Civ. 1898 (SAS)

-----x

New York, N.Y.  
February 24, 2012  
4:30 p.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

WEITZ & LUXENBERG, P.C.  
Attorneys for La Susa  
BY: WILLIAM A. WALSH

MILLER AXLINE & SAWYER LLP  
Attorneys for NJ DEP  
BY: MICHAEL D. AXLINE

JOHN K. DEMA  
Attorney for NJ American Water Company

COHN, LIFLAND, PEARLMAN, HERRMANN & KNOFF LLP  
Attorneys for NJ American Water Company  
BY: LEONARD Z. KAUFMAN

McDERMOTT, WILL & EMERY  
Attorneys for ExxonMobil Corp.  
BY: STEPHEN J. RICARDELLI

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES

SEDGWICK LLP

Attorneys for Shell Oil Co.; Texaco Refining and  
Marketing, Inc.; Chevron U.S.A. Inc.; Motiva Enterprises;  
Equilon Enterprises, LLC

BY: PETER C. CONDRON

BAKER & BOTTS LLP

Attorneys for Hess and Marathon

BY: STEVEN L. LEIFER

SHEPPARD MULLIN RICHTER & HAMPTON LLP

Attorneys for ExxonMobil

BY: JEFFREY J. PARKER

GREENBERG TRAURIG LLP

Attorneys for El Paso and Coastal Eagle Point

BY: DAWN ELLISON

1 (Case called)

2 THE COURT: Good afternoon. I have letters from both  
3 sides, letters from both the plaintiffs and defendants, dated  
4 February 16, reply letters from both dated February 21st.

5 Again I thank you for not inundating us with more than one  
6 letter per side and one reply per side. That is very helpful.

7 The first item has to do with the City of Merced case,  
8 which I understand finished a trial in the state court in  
9 California with a verdict for the plaintiffs. But the  
10 California supreme court also recently upheld a law abolishing  
11 redevelopment agencies, RDA's, which is the plaintiff, and that  
12 raises a question as to whether the Merced RDA has legal  
13 standing to continue the case. Somebody may be able to report  
14 to me on what is going on with the Merced case.

15 MR. AXLINE: Mike Axline, your Honor. The law that  
16 abolished the RDA's provided for several procedures for the  
17 orderly wind-up of their business, one of which was the  
18 appointment of a board by the governor that would then be  
19 charged with winding down the business of the RDA. That's the  
20 direction it has gone in Merced.

21 The governor is in the process of appointing a board.  
22 That board will then meet. We will meet with that board once  
23 it has been constituted and discuss how the board wants to  
24 proceed with winding up the business of the RDA. Part of the  
25 business of the RDA is the RDA's claim in this case.

1           That is all I can report to you as to the status of  
2 things.

3           THE COURT: I guess I still have two questions. What  
4 is the time frame by which you would know, and therefore the  
5 Court would know, whether this action continues, whether the  
6 board wants this action to continue? What do you think the  
7 time frame is? Secondly, what is the effect of the state court  
8 verdict on this lawsuit?

9           MR. AXLINE: The answer to the first question is I  
10 don't have a precise time frame.

11          THE COURT: Not precise.

12          MR. AXLINE: I know the governor has appointed at  
13 least one board member. He has offered it to several others,  
14 who haven't accepted it. That process is under way. I would  
15 hope that the board would be constituted by the end of next  
16 week and we would then have a chance to meet with them. I  
17 think within a couple of weeks we ought to have something to  
18 report to you.

19          THE COURT: Probably by the next status conference if  
20 the next status conference is a month away?

21          MR. AXLINE: Certainly by the next status conference,  
22 yes.

23          THE COURT: Does anybody object to calendaring that  
24 for a month from now, either side?

25          MR. PARKER: No, your Honor, that is fine.

1 MR. AXLINE: As to your second question, the impact of  
2 the jury's verdict, I don't think there is any direct impact on  
3 the RDA's case. I wanted to report that to the Court.

4 THE COURT: Why is that?

5 MR. AXLINE: Why did I want to report it?

6 THE COURT: No. Why is there no impact?

7 MR. AXLINE: They are different plaintiffs.

8 THE COURT: I know they are different plaintiffs. But  
9 is it the same injuries, the same places impacted? I don't  
10 know the relationship between the two cases.

11 MR. AXLINE: There is some relationship in that sense.  
12 The RDA was overseeing the clean-up at two of the worst release  
13 sites in Merced and had spent money to do that as the RDA. The  
14 city's case involved some of the city's money separate from the  
15 RDA that had been spent on those same stations, but that was  
16 relatively small amount. And other stations that were not  
17 within the --

18 THE COURT: As to the overlapping stations, might  
19 there be some collateral estoppel effect, same defendants, same  
20 site, same finding that they were liable for an impact to the  
21 area?

22 MR. AXLINE: There may well be, your Honor. I haven't  
23 looked at this yet, but --

24 THE COURT: I didn't mean to give you any ideas. Take  
25 a look at that and let me know.

1 MR. AXLINE: You inadvertently did. I do think that  
2 that is worth examining.

3 THE COURT: Let's go on then, put that item over for a  
4 month and go on to the defendants' agenda item, the first of  
5 which is the privilege log challenge to the plaintiffs'  
6 November 17th and January 27th privilege log. I think we  
7 discussed the privilege log at the last conference, and I think  
8 in January I said to the plaintiffs that they should update the  
9 November privilege log with respect to some of the descriptions  
10 of the deliberative process privilege, claims of privilege.

11 As I understand it, and I don't know if this is true,  
12 the plaintiffs did not really take the opportunity to update  
13 the November privilege log. Is that right?

14 MR. KAUFMAN: That's right, your Honor. We felt that  
15 the descriptions in those were sufficient and were willing to  
16 defend them if there is a challenge.

17 THE COURT: There is a challenge. If that's that,  
18 then do the defendants wish to --

19 MS. ELLISON: Your Honor, we were hoping you could set  
20 a schedule for the challenge. Given the time constraints of  
21 this conference, we didn't think you wanted this. We  
22 anticipate challenging approximately 75 of the entries. We  
23 weren't sure how you wanted to handle that. We were hoping to  
24 get a schedule set for submissions relating to the challenge.

25 THE COURT: OK. When do you want to submit? If

1 you're going to challenge 75 different submissions, it still  
2 has to be done in 25 pages. That doesn't change the length of  
3 the brief at all. The law is the law, and then you group them  
4 and say the following 5 are insufficient for this reason, the  
5 following 10 are insufficient for this reason, if the Court  
6 wishes us to submit all 75 in camera, we will, but here are the  
7 reasons that the descriptions are insufficient.

8 MS. ELLISON: We don't anticipate needing additional  
9 page limits. We think there are categorical challenges, so we  
10 anticipate putting in a fairly short submission and attaching  
11 the exact entry for plaintiff to challenge. We can be prepared  
12 to put that submission in to you by Tuesday.

13 THE COURT: Fine.

14 MS. ELLISON: We would just ask that your Honor set  
15 the dates for the response and the ultimate hearing so that we  
16 know exactly when it's going to be resolved.

17 THE COURT: That's what I always do.

18 MS. ELLISON: Great.

19 THE COURT: You won't know exactly when it's going to  
20 be resolved. That much I can't promise. But I can set the  
21 schedule. The brief coming in 2/28. How long do you need to  
22 respond?

23 MR. KAUFMAN: I would think probably two weeks.

24 THE COURT: I must be a mind reader. I knew you are  
25 going to say two weeks. March 13th. And the reply, Ms.

1 Ellison?

2 MS. ELLISON: Your Honor, one week?

3 THE COURT: Sure. That will be fully submitted March  
4 20th. I can't tell you now about a hearing and I can't tell  
5 you now about a decision. When the papers come in, that's when  
6 I'll have a chance to look at it.

7 MS. ELLISON: Thank you, your Honor.

8 THE COURT: The next agenda item it sounded like you  
9 might have resolved. I'm summarizing it. Are you ready, Mr.  
10 Ricardelli?

11 MR. RICARDELLI: Yes. We have met and conferred on  
12 that, which is agenda item 3, and we don't have any issues for  
13 the conference day.

14 THE COURT: The record will never know what that was.  
15 I was going to say I would summarize it as update on the use of  
16 market share liability theory, private damages, and site  
17 designations pursuant to CMO 78. Is that fair?

18 MR. RICARDELLI: That's fair.

19 THE COURT: That's one for now that there is no  
20 dispute for me?

21 MR. RICARDELLI: That's correct.

22 MR. LEIFER: Your Honor, may I interrupt? I know we  
23 are making a lot of progress.

24 THE COURT: Yes.

25 MR. LEIFER: We actually had an agenda item at the



front that we may have skipped over. The deliberative process debate had two aspects to it.

THE COURT: It did.

MR. LEIFER: We can address it in whatever order you would like, of course.

THE COURT: Right. I was going to get back to it later in this agenda. I do know there is a second issue on deliberative process. Is this the one about even if the privilege log is adequate, you're saying because they have a failure to warn theory, your need to know what they knew and when they knew it overrides any deliberative process privilege anyway?

MR. LEIFER: There is that overriding argument. It is partly based on the failure to warn, as your Honor points out. We have some other reasons why we think the necessity outweighs the government's interest in nondisclosure. We had proposed in our correspondence with you that we set an expedited briefing schedule on that subject.

THE COURT: Yes, but I'm worried about that because I don't want to do that in a vacuum. It seems to me your theory is even if a document satisfied all the requirements of asserting the privilege as a policy matter, since it is a qualified privilege, we can override it even if it's properly asserted.

MR. LEIFER: Yes, as relates to the documents on the

1 one hand. But we also have an issue coming up with --

2 THE COURT: Depositions?

3 MR. LEIFER: Depositions.

4 THE COURT: Right.

5 MR. LEIFER: We know that those issues are going to be  
6 contested. They already have been in a prior deposition that  
7 was somewhat similar. That is why we had proposed this rather  
8 short briefing schedule, so that we could get, hopefully, a  
9 resolution before early April, when these two high-level DEP  
10 officials are scheduled to be deposed.

11 THE COURT: Do the plaintiffs agree this is ripe for  
12 resolution by the Court in this somewhat general way that they  
13 are saying, even if properly asserted? That's how the motion  
14 would have to start. It wouldn't start attacking the way it's  
15 asserted; that would be double work. You would have to say,  
16 assuming for the sake of this motion only that they properly  
17 asserted it, we can override it because. That's right, Mr.  
18 Leifer, that's how you framed the motion?

19 MR. LEIFER: Yes.

20 THE COURT: Not challenging the way in which it's  
21 asserted?

22 MR. LEIFER: Not relative to, obviously, deposition  
23 testimony.

24 THE COURT: Or even the documents.

25 MR. LEIFER: We are taking that on the other side.

1 THE COURT: That's right. This would only say,  
2 assuming for the sake of argument only that it has been  
3 properly asserted, we now say we can override it on the  
4 qualified basis because our need for the information and the  
5 failure to be able to get it anywhere else overrides any  
6 privilege.

7 MR. LEIFER: That's correct, your Honor.

8 THE COURT: That's the motion. Mr. Kaufman?

9 MR. KAUFMAN: I'm not sure I heard the question. If  
10 the question is do we think it is ripe, the answer is no. Do  
11 we think it is necessary? The answer for that is also no.  
12 Under no circumstances have we or do we intend to withhold  
13 information. Facts have always been provided to them.

14 THE COURT: Mr. Leifer said it already came up at one  
15 deposition.

16 MR. KAUFMAN: That's correct. No facts were withheld.  
17 In fact, the direction to the witness was don't withhold facts.  
18 You may withhold deliberations and opinions, but do not --

19 THE COURT: Apparently that is what he wants to have a  
20 motion about, that your direction to withhold the opinions and  
21 deliberations he feels is inappropriate in this circumstance  
22 because his need for the information and his inability to get  
23 it from any other source outweighs the qualified privilege.  
24 It's not an absolute privilege.

25 MR. KAUFMAN: The problem I have, your Honor, is when

1 the defendants say that they need information, they use that in  
2 two different ways. On the one hand, they say they need  
3 information as facts. If that's how they use it --

4 THE COURT: No. We have covered that. You just said,  
5 I told my witness to give them the facts, I'm going to tell  
6 each witness to give them facts. It's not a matter of the  
7 facts, it's a matter of the deliberations and the opinions. Do  
8 you understand that, Mr. Leifer? He is giving you the facts.

9 MR. LEIFER: I do understand that, your Honor.

10 THE COURT: You want the deliberations and opinions?

11 MR. LEIFER: That's right.

12 THE COURT: So we all know the motion we are talking  
13 about. There is no confusion. It's not about the facts.

14 MR. KAUFMAN: Again, your Honor, we don't think that  
15 that is ripe.

16 THE COURT: That's what the motion is about. Of  
17 course you don't think it is right.

18 MR. KAUFMAN: Ripe. I'm sorry.

19 THE COURT: Why is that not ripe?

20 MR. KAUFMAN: Because they haven't identified any  
21 question where the privilege has been asserted at a deposition  
22 and information, as they now define it, has been withheld from  
23 them.

24 THE COURT: I thought Mr. Leifer said --

25 MR. KAUFMAN: Otherwise, it is just an advisory

1 opinion.

2 THE COURT: I don't want to do that. I thought Mr.  
3 Leifer said this has already arisen at a deposition.

4 MR. LEIFER: I was at that deposition and I was taking  
5 it. What happened is we deposed a woman named Nancy  
6 Wittenberg, who is somewhat of a marginal player in this drama.  
7 I asked her about her opinions and the opinions of the  
8 department about the risks and benefits of oxygenates, ethanol  
9 as an example.

10 Mr. Kaufman gave an instruction. He said, when you  
11 answer, do not disclose any deliberative information. She gave  
12 an answer. I asked her, did you withhold anything based on Mr.  
13 Kaufman's instruction? She said no, because she didn't have  
14 any information.

15 I'm not saying that relevant to her we didn't get  
16 information. What I'm saying is that when we depose in early  
17 April the big cheeses in the department, we need to be able to  
18 ask about these opinions and considerations about the risks and  
19 benefits of ethanol and MTBE at that time. I know this is  
20 going to come up. If we have any doubt about whether it is  
21 going to come up or not, with your Honor's permission, we could  
22 ask Mr. Kaufman, If I ask this question, are you going to  
23 assert the privilege? and there won't be any question.

24 THE COURT: I agree. Now I understand it has not yet  
25 come up in a concrete way, but depositions are scheduled in

1 April of senior people and Mr. Leifer wants to ask those senior  
2 people what happened during deliberations, what was your  
3 opinion, why was that your opinion. Those are the questions  
4 you want to ask, Mr. Leifer?

5 MR. LEIFER: Yes.

6 THE COURT: Are you going to let your witness answer  
7 those questions?

8 MR. KAUFMAN: Not as presently constituted, no. I  
9 would think that the privilege would clearly apply to those  
10 questions.

11 THE COURT: Last I heard it's a qualified privilege,  
12 it's not absolute. If it were attorney-client it would clearly  
13 apply, but this is a qualified privilege. It can always be  
14 overridden, just like work product can be overridden.

15 MR. KAUFMAN: That's correct. The burden is on the  
16 defendants.

17 THE COURT: Agreed. That's why he wants to make the  
18 motion.

19 MR. KAUFMAN: I guess I can't stop him from making the  
20 motion.

21 THE COURT: You can. It doesn't have to be today, but  
22 it sounds like you will only lose time if he goes through those  
23 questions at the deposition of the senior official, you object  
24 and instruct the witness not to answer, then you have to break  
25 the deposition, and then he has to make the motion.

1           Since he knows you are not going to let that witness  
2 talk about deliberations or opinions, he says, I'm ready to go.  
3 He knows it's his burden and he is willing to make the motion.  
4 The only problem is, Mr. Leifer, to make it concrete I think  
5 you had better put in your brief the questions you would ask.

6           MR. LEIFER: That's fair, your Honor. We will do  
7 that.

8           THE COURT: What you seek to elicit, maybe when you  
9 put it in writing, Mr. Kaufman will analyze it and say, you  
10 know what, he can answer that. It depends how you say it.  
11 Even now, when I pretended I was you and asked the questions,  
12 he said I would object as constituted. You might not ask it  
13 that way.

14          MR. LEIFER: Fair enough, your Honor.

15          THE COURT: I think you are pretty much required to  
16 say here is what I want to ask and attach a small script of the  
17 kinds of information you would like the witness to answer.  
18 When he sees it, he can decide whether he actually would  
19 instruct the person not to give it or he could say you can have  
20 that.

21          With respect to documents, however, Mr. Leifer, other  
22 than the problems of the alleged inadequacy of the log, are you  
23 also moving with respect to them?

24          MR. LEIFER: Not yet.

25          THE COURT: What do you mean not yet? I don't want to

1 do this three times. If I'm doing the legal principles on the  
2 very question of the opinions and deliberations that might  
3 otherwise be subject to the privilege but for the fact that you  
4 can prove the need and inability to get it elsewhere, might as  
5 well do the same thing for the documents at the same time.

6 MR. LEIFER: Fair enough, your Honor. I'm splitting  
7 hairs a little bit, admittedly. On the one hand we have a  
8 situation where we are alleging they have not improved the  
9 descriptions in the privilege log.

10 THE COURT: I hadn't heard that part.

11 MR. LEIFER: Let's say we now agree that the privilege  
12 log has been adequately -- at least that they described it  
13 properly. One issue that has arisen is doesn't the allegedly  
14 privileged document have to be predecisional and doesn't have  
15 to relate to a particular decision? When you look at the  
16 document, it might be clear or it might be clear from an in  
17 camera review that it doesn't really relate to a decision,  
18 which is a different issue from whether it is facially  
19 deficient. I know that is a little bit of a subtle difference.

20 THE COURT: Not really. I've written, I'm sure, half  
21 a dozen opinions on this identical subject over the last 17  
22 years.

23 MR. LEIFER: I know.

24 THE COURT: It's not even hard to find them anymore.  
25 Just plug in the words "deliberative process."



1 MR. LEIFER: I believe that second argument that I'm  
2 making, that it is not predecisional, will essentially be moot  
3 relative to the 75 documents that Ms. Ellison talked about.

4 THE COURT: Because they are not?

5 MR. LEIFER: Because they don't really relate to any  
6 decision and they don't say that they do. Putting aside  
7 whether they actually do or not, they don't say that they do.  
8 So I think this issue will probably, I hope, be decided in our  
9 favor on those documents and I won't have to worry about it any  
10 further. That's why I was thinking of it sequentially. I know  
11 you don't want to draw this out.

12 THE COURT: It's not even that. I don't want three  
13 motions on deliberative process.

14 MR. LEIFER: Here is what we will do. We will include  
15 in our brief a mention of this issue so it's in front of your  
16 Honor and we can get rid of it.

17 THE COURT: With respect to documents also.

18 MR. LEIFER: Yes.

19 THE COURT: To the extent the document is in fact  
20 predecisional, in other words, it meets all of the  
21 qualifications of the privilege, we make the same argument for  
22 overriding that privilege that we make with respect to the  
23 deposition questions.

24 MR. LEIFER: Fair enough, your Honor. Now, we had  
25 proposed a schedule, but we are flexible on what that would be.

1 THE COURT: What did you propose?

2 MR. LEIFER: We proposed a week after this hearing for  
3 our brief. We said we would do it simultaneously with theirs.

4 THE COURT: No.

5 MR. LEIFER: Then we'll set a time period for them to  
6 respond. Then we would like a reply. We are trying to do this  
7 pretty quickly because of the upcoming depositions.

8 THE COURT: I know. You're proposing March 2nd.  
9 That's a week.

10 MR. LEIFER: Yes.

11 THE COURT: Mr. Kaufman, again, how long do you want  
12 to respond?

13 MR. KAUFMAN: Maybe I should have asked for three  
14 weeks for the other one.

15 THE COURT: No, no. Let's not work backwards.

16 MR. KAUFMAN: I suppose two weeks would be --

17 THE COURT: March 16th. And the reply?

18 MR. LEIFER: A week later, I guess.

19 THE COURT: Which takes us to March 23rd. I can't  
20 make the promise that --

21 MR. LEIFER: I know.

22 THE COURT: When is the deposition?

23 MR. LEIFER: It's April 2nd and 3rd. I was hoping  
24 that we would give --

25 THE COURT: I'm not going to have it in time. You may

1 have to adjourn those depositions to wait for the ruling. I  
2 would like it not to be that way, but there are only 7 days a  
3 week, and most of those days have 24 hours.

4 MR. LEIFER: We have been exchanging correspondence  
5 and calls with the plaintiffs. I was hoping that they would  
6 need a full two weeks, given that these issues have been on the  
7 table.

8 THE COURT: I have already written on this to some  
9 extent, even in the MTBE cases. I have written on it in other  
10 cases maybe more clearly, but on this case absolutely.

11 MR. LEIFER: The law is clear whether we can meet our  
12 burden to override. That's where the intricacies of this case  
13 come to the fore. It's very clear. I was hoping that maybe  
14 one week and one week and one week. That would give at least  
15 more time for your Honor to rule. If your Honor does not rule,  
16 fine, we'll deal with it then.

17 MR. KAUFMAN: Your Honor, I really do not think that  
18 we could give this its proper attention in a one-week span.  
19 They have had whatever time they had to prepare up to this. We  
20 have only had sort of these vague, unclear ideas of what this  
21 is all about. I really would request more time.

22 THE COURT: You should just stop at "I need two  
23 weeks." The rest of it sounds weak.

24 Now we are up to Puerto Rico. There are sites that  
25 are nondetect and there are sites that are nontest. With

1 respect to the nondetect, I thought -- it's you? OK, Mr. Dema.  
2 I thought with respect to the nondetect you were ready to  
3 dismiss.

4 MR. DEMA: Yes, your Honor, and we had suggested a  
5 meet-and-confer with the defendants to go through and discuss  
6 with them particular sites.

7 THE COURT: But nondetect in theory you're ready to  
8 dismiss?

9 MR. DEMA: Certainly they are not ripe with regard to  
10 any claim, and we put the nontest in that same category.

11 THE COURT: You are ready to dismiss them. The only  
12 issue is with or without prejudice, and you would certainly  
13 argue without prejudice because they could become contaminated  
14 five years from now.

15 MR. DEMA: That that is exactly the same as your Honor  
16 addressed a month ago.

17 THE COURT: Yes.

18 MR. RICARDELLI: Your Honor, there are two issues  
19 here.

20 THE COURT: I'm only focusing on nondetect so far.

21 MR. RICARDELLI: Agreed. But there are two universes  
22 of nondetect that this relates to. At the last status  
23 conference we did talk about the 18 discovery sites that were  
24 fully worked up where they were nondetect. We spend a year  
25 taking discovery at that time, and there seems to be a

1 discrepancy between the question I asked your Honor and the way  
2 it was recorded in the transcript. I actually asked if those  
3 18 sites would be dismissed with prejudice because we had spent  
4 a year frankly taking full discovery on them and now they were  
5 being dismissed.

6 The issue we put on the agenda here in terms of  
7 nontest/nondetect relates to the remaining universe of sites.

8 THE COURT: Breaking it out, with respect to the 18  
9 sites, Mr. Ricardelli thinks those should be dismissed with  
10 prejudice because they were selected as focus sites, a year's  
11 worth of work was put into it, and only after a lot of time and  
12 money was spent did you say, we concede they never had a  
13 detection. He is saying that already warrants a dismissal with  
14 prejudice, it's just not fair to have a second bite at that  
15 ample.

16 However, with respect to all the other nondetects, Mr.  
17 Ricardelli, I assume you can't oppose a without prejudice  
18 dismissal.

19 MR. RICARDELLI: We would accept the without prejudice  
20 dismissal.

21 THE COURT: I think that takes care of the nondetects  
22 other than the focus sites. With respect to the 18, I assume  
23 Mr. Dema still wants to be heard.

24 MR. DEMA: Yes, your Honor. The transcript was quite  
25 clear. This was addressed on page 21/lines 11 to 14. I truly

1 believe the court reporter, happily, recorded this Court  
2 agreeing that absolutely Mr. Ricardelli's words without  
3 prejudice would be how it came down.

4 THE COURT: Mr. Ricardelli's words?

5 MR. DEMA: That's in the transcript. Now Mr.  
6 Ricardelli is essentially saying the court reporter got it  
7 wrong.

8 THE COURT: Do you have those pages with you?

9 MR. DEMA: I do not have the transcript with me. Yes,  
10 Exhibit C.

11 THE COURT: I didn't bring the letters.

12 MR. DEMA: I'm sorry. I do have them with me.

13 THE COURT: If you have it with you, I'd like to look  
14 at those pages and see what error you're pointing to or what  
15 alleged error.

16 MR. DEMA: May I hand it up, your Honor?

17 THE COURT: Please. Mr. Ricardelli asked the  
18 question. The transcript quotes Mr. Ricardelli as saying, "We  
19 will have to go back and take a look at that. For the 18 that  
20 we've taken discovery now and confirmed they are without, Mr.  
21 Axline said they were dismissed."

22 The Court said, "He did."

23 Mr. Ricardelli says, "Without prejudice?"

24 I say, "It should be, absolutely. I need a paper to  
25 sign."

1           It is a little unclear. It's not maybe a  
2 transcription error. He might have asked the question, did the  
3 Court mean without prejudice, and apparently I said it should  
4 be. I thought you were trying to say Mr. Ricardelli said it  
5 should be without prejudice.

6           MR. DEMA: No. I totally agree he asked the question,  
7 and I totally agree the transcript does reflect that your  
8 answer was "absolutely." I would suggest to the Court that the  
9 lament that they conducted all this discovery on these sites is  
10 certainly overshooting the mark, because we had given 2,000  
11 some-odd sites showing what the plaintiffs said were leaking  
12 sites.

13           A year ago in February we gave a list of the 276 sites  
14 that had detentions of MTBE. The defendants chose not to  
15 select a single site from that list. This Court gave them the  
16 opportunity to come back with eight.

17           THE COURT: We're getting there.

18           MR. DEMA: It's the plaintiffs' suggestion, your  
19 Honor, that indeed they did not have to spend this time. It  
20 was a burden they chose, and it's an exercise in gamesmanship  
21 as to which sites to select. The Court said last time that  
22 they don't have to select a site that's worse for them, that's  
23 true. But they also have some choice in what they do select.

24           If they had the files, they knew there were no MTBE  
25 when they made the selection. So the sympathy that could arise

1 by saying we selected sites without MTBE and then we deposed  
2 people has only certain limited appeal, I would suggest.

3 MR. RICARDELLI: Your Honor, that sounds great, but it  
4 ignores the sequence of events in this case. The site files  
5 that we relied on to pick our sites were produced to us in  
6 April of 2010. The original order by this Court for us to  
7 designate sites was at the end of 2010, four months before we  
8 got their list of 276 sites. We didn't have the benefit of  
9 that list where they said this is where we have confirmed there  
10 were hits.

11 THE COURT: If there are going to be potentially  
12 thousands of sites on which they could come back if and when  
13 they are impacted, it hardly troubles me that this might be  
14 true for those 18 also. They are all in the same position.  
15 These are all nondetect sites. Whether they are part of the 18  
16 or part of the couple thousand, either way you face future  
17 claims if there is an impact.

18 I'm going to stick with the without prejudice for the  
19 nondetects both in the focus group and outside the focus group,  
20 which apparently amounts to thousands of locations. They are  
21 all dismissed. The case is narrowed significantly. But if  
22 some day they are impacted, they are impacted. What can I do?  
23 Worry about it then.

24 MR. RICARDELLI: That is for the nondetect, your  
25 Honor?



1 THE COURT: For the nondetect, yes. Now, what are we  
2 going to do about the nontest locations?

3 MR. DEMA: Our suggestion, your Honor, is that this is  
4 a question of ripeness that hasn't even come into play.

5 THE COURT: But you have sued with respect to those.  
6 How could you sue if there is no claim? You can't to that.

7 MR. DEMA: Puerto Rico was not a jurisdiction that  
8 tested. As of March 2011 they now have a policy in place where  
9 they are requiring testing. More sites, it runs in the high 80  
10 percentile, are showing MTBE as the testing goes forward.  
11 Obviously, those sites are introduced into the case because  
12 they have evidence of MTBE.

13 With regard to the claims with regard to the sites  
14 that have not been tested, they are not ripe.

15 THE COURT: They are not ripe, so they are not in the  
16 suit.

17 MR. DEMA: We never claimed that we are suing on the  
18 sites where we haven't tested.

19 THE COURT: How do we do this as a piece of paper?

20 MR. RICARDELLI: Your Honor, what we had proposed and  
21 I think the way to do this here -- we got an amended confirmed  
22 site list last night with approximately 80,000 pages of  
23 documents that. Despite representations that we had had  
24 everything, it showed up last night. The letter said they were  
25 coming.

1 Now we have apparently just under 300 sites with  
2 confirmed hits, at least as far as plaintiffs understand it.  
3 The three sites that we designated as trial sites, defendants  
4 designated in this case, are not on their list. One of them is  
5 out of the three we designated. So out of the 296 plus 2, they  
6 have got a list here of 298 sites, and that should be the  
7 entire universe for this case. Everything is sort of gone at  
8 this point.

9 THE COURT: It is gone. We need to put it in a paper.  
10 But here is the question. If this is an ongoing testing effort  
11 and on Monday the test is run somewhere in Puerto Rico and it  
12 tests positive, what do they have to do, file an amended  
13 complaint every day as the testing continues?

14 MR. RICARDELLI: Your Honor, we took discovery last  
15 year. While Mr. Dema is right that there was no statutory  
16 requirement previous to now that the commonwealth tested for  
17 MTBE or didn't require it, it certainly had the authority to  
18 require the persons or the companies handling the clean-up to  
19 conduct that testing. Frankly, that's what these records are.  
20 So it's not as though there wasn't testing being done.

21 THE COURT: I understand. But you don't test  
22 thousands of sites on the same day. It's a process. It takes  
23 time to go to so many sites. It could take a year. All I'm  
24 asking you is if a site is tested next Monday or next Friday  
25 and it turns out positive, what do they do? If today we say

1 this case has 298 sites and that's what it has, that's the  
2 whole case, then another site tests positive, what do we do?

3 MR. RICARDELLI: I can confer with my colleagues for a  
4 moment. Maybe that is the best way for me.

5 THE COURT: OK.

6 MR. DEMA: The last time you did address this, Judge.  
7 You said it's not about the hundreds of other sites, it's about  
8 the trial sites.

9 THE COURT: Frankly, I don't remember a thing I said  
10 the last time. Let them confer.

11 (Pause)

12 MR. RICARDELLI: Your Honor, this does pose a little  
13 bit of a problem because we don't want this just to continue  
14 indefinitely. There was a case filed in 2011. It's already  
15 approaching being 5 years old. We think if the commonwealth is  
16 going to go out and test these sites, there needs to be a date  
17 by which they to it.

18 The original site files were produced to us in 2010,  
19 and this was the total universe of sites that were at issue:  
20 Leaking underground storage tanks, MTBE, no MTBE. But we have  
21 been dealing with this trying to define the landscape for two  
22 years. Now it sounds like this is going to go on indefinitely.

23 There needs to be a cutoff. MTBE is not being used in  
24 gasoline anymore. If they have MTBE detected at these sites,  
25 it could be determined now and this case can be done. We would

1 ask for a dates by which they have to either put sites on the  
2 list or not.

3 THE COURT: That seems like a fair idea also. What  
4 they are saying is the defendants should be in a position of  
5 closing out their liability either by settlement or a favorable  
6 verdict or a motion. They need to wrap up all this exposure,  
7 not to make a pun.

8 You need to tell us by when you close the universe of  
9 what's at issue in the Puerto Rico case. I think that is fair.  
10 Things can always happen later. Here is a product that is not  
11 in use. At some point finish your testing and that is the  
12 case.

13 MR. DEMA: Your Honor, the law banning MTBE in Puerto  
14 Rico has just passed within the last several months.

15 THE COURT: That may be true of the law, but the  
16 defendants have stopped using this product.

17 MR. RICARDELLI: Correct.

18 MR. DEMA: The defendants in their discovery for the  
19 most part claim they never used the product, that it's sort of  
20 some deus ex machina appearance because Puerto Rico is a  
21 nonattainment jurisdiction.

22 THE COURT: To the extent they did, they stopped.  
23 When did they stop?

24 MR. DEMA: We don't know, because a lot of them say  
25 they never started.

1 THE COURT: Mr. Ricardelli?

2 MR. RICARDELLI: 2006 for the majority of us. I don't  
3 speak for everybody.

4 MR. DEMA: We have a regulatory agency, your Honor,  
5 and it just changed its policy as of March. I would  
6 respectfully suggest you give us an opportunity to talk to our  
7 client. Perhaps, since the problem of introduction of MTBE  
8 into Puerto Rico and its soils and groundwater was caused by  
9 the defendants, we could have a meeting with them with the  
10 regulatory agency.

11 What is likely to happen is the regulatory agency will  
12 make the defendants test. Then they will answer their own  
13 question as to when they could complete the test. They have  
14 the leaking underground storage tanks, not the commonwealth,  
15 and they put the MTBE in the water.

16 If we could in the intervening month before we have  
17 the next conference meet with the regulator and meet with the  
18 defendants, we could probably come out, because I'm sure the  
19 defendants are eager to test what the results of their leaking  
20 tanks were.

21 THE COURT: Are you doing testing there?

22 MR. RICARDELLI: Yes, your Honor, at the sites that we  
23 control. But this is a historical UST list. To be fair, your  
24 Honor, the list they gave us originally with close to 750 sites  
25 was a list they inherited, the commonwealth inherited, from

1 EPA. EPA has regularly told them this list is overbroad. You  
2 have sites on there which are really nothing more than tank UST  
3 registration violations; they are not even real leaking sites.

4 In this case, and this is the commonwealth's failure  
5 to maintain accurate records, there are sites on here which we  
6 have no affiliation to. These are not sites that are operated  
7 by the defendants due to common law statute that doesn't allow  
8 us to operate them.

9 THE COURT: Let me tell you where I come out. The  
10 issue is not terribly well developed for setting a deadline  
11 today, but we certainly have opened the discussion. I'm  
12 putting it on the agenda for one month from today, at which  
13 time I will set a deadline for testing but do it with more  
14 information.

15 Maybe plaintiff will make a proposal before that  
16 conference. Maybe they will meet and confer with you and you  
17 will agree on a proposal. I was thinking six months maximum,  
18 but I don't know if that is realistic. They haven't talked to  
19 their client. You haven't thought about it with them.

20 Meet and confer, that is always a good idea. Giving  
21 them time to a talk to their client is a good idea. A month  
22 from today or whatever we pick I will set a deadline. Then, I  
23 agree with you, Mr. Ricardelli, either they test or they don't.

24 MR. RICARDELLI: Thank you, your Honor. Just for our  
25 purposes now, the other sites are out?

1 THE COURT: We went through that. Without prejudice.  
2 Prepare an order.

3 MR. RICARDELLI: Do you want us to submit a list or do  
4 you want us to hold off until the next conference.

5 THE COURT: We shouldn't hold off the nondetects. We  
6 talked about it. That's what I'm going to do. They are all  
7 dismissed without prejudice.

8 MR. AXLINE: Your Honor, I assume they will run that  
9 by us.

10 THE COURT: They are not in the habit of submitting  
11 proposed others to the Court ex parte.

12 Now the trial sites issue, still Puerto Rico.  
13 Defendants were given the opportunity to select additional  
14 sites. I gave them the opportunity to select eight additional  
15 sites. They say, we have only been able to designate one  
16 additional site, so now it's not fair because we only have one  
17 and the plaintiffs have ten, so you should make them drop a  
18 bunch. Why is it you only added one site, Mr. Ricardelli?

19 MR. RICARDELLI: Your Honor, frankly we did a lot of  
20 work trying to get to that additional site. We are working off  
21 incomplete site files. A lot of these were in Spanish. The  
22 last time we went and picked 20 discovery sites and it took a  
23 lot of time to get to those 20. Then we took a year to get to  
24 our ten for trial. A lot of stuff goes into that in terms of  
25 location, proximity to other sites, proximity to wells.

1 THE COURT: One issue you don't have which you had in  
2 New Jersey is you will have all defendants in, as I understand  
3 it. You don't have to worry about getting the defendants in by  
4 picking a number of sites. Do you know what I mean, that issue  
5 we had in New Jersey?

6 MR. RICARDELLI: That's a little bit different. But  
7 that may not be true here, either, so it does matter as to who  
8 operates the service station, proximity to other locations.  
9 Unlike New Jersey, though, where we have it electronically in  
10 terms of we are able to plot the sites, plot the wells, here it  
11 is not that easy.

12 We are working with Spanish documents. We actually  
13 had to have our consultants in 30 days, once we narrowed the  
14 universe down, run around the island and try to spot-check  
15 sites to make sure we knew where they were. Frankly, in 30  
16 days the best we could do in terms of comfort level for  
17 designating for them --

18 Again, this isn't saying we can go take discovery on  
19 them. This is we are going to go to trial on this site. We  
20 were able to find one where we were comfortable. Frankly, we  
21 weren't all that comfortable anyway, but we did.

22 THE COURT: I don't see why the plaintiffs should be  
23 required to drop sites. You had the opportunity to add sites.  
24 I said you could add up to eight. I just need to hear the  
25 explanation of why you couldn't do it and whether you say, I



1 need 30 more days to do it and I can do it, give me 30 more  
2 days, and I'll extend it.

3 But I don't know that the answer is they should cut  
4 back. The argument has been made that you went out of your way  
5 to pick sites that you knew, frankly, were nondetect all along  
6 and wasted time doing so. That argument was made a moment ago  
7 about the 18.

8 MR. RICARDELLI: Your Honor, I didn't address it then,  
9 but I have verified interrogatory responses for those 18 sites  
10 where they said that the releases from those sites threatened  
11 wells with the presence of MTBE. I've got delineations for all  
12 18 of those sites where the MTBE would go. I understand that  
13 we picked bad sites. But, frankly, they verified  
14 interrogatories --

15 THE COURT: You picked the weakest sites you could  
16 find, which is natural. They are going to pick the strongest,  
17 you're going to pick the weakest. But if you intentionally  
18 pick a bunch that are so weak that they are going to be  
19 dismissed because they are nondetect, it is sort of a waste of  
20 time. I don't truly understand the explanation yet about why  
21 you couldn't add more than one in the time you had.

22 MR. RICARDELLI: 30 days wasn't enough for us to run  
23 the traps that we need to run on the sites because of the  
24 condition of the files, the location. For example, your Honor,  
25 we picked one of the sites that we designated last week was a

1 facility in St. Germain, I'm probably mispronouncing that, in  
2 Puerto Rico. Last night we received the updated site list from  
3 plaintiffs that included two new sites with confirmed MTBE  
4 releases that were never before identified for us, and they are  
5 in St. Germain, Puerto Rico.

6 We didn't have the benefit of being able to plot the  
7 site we designated against two new sites now that have MTBE.  
8 You know from the New Jersey case when they delineate these  
9 sites, they at times capture other sites. One of the things we  
10 looked for was proximity to other service stations.

11 THE COURT: If you had another 30 days, could you  
12 complete the selection process? I would like to get the cohort  
13 set and immovable. That would be a big help. But I don't  
14 think the way to achieve it is to cut the plaintiffs back from  
15 10 to 3.

16 MR. RICARDELLI: I don't know how far we could get,  
17 your Honor. We certainly could use the 30 days. I don't know  
18 that we could get to 10, 7 more sites in 30 days.

19 We look at this as your Honor put this process in  
20 place two years ago. We worked through this, worked in good  
21 faith, and we relied on this. Frankly, this is a case  
22 management process. Plaintiffs have said they went and picked  
23 sites based on geographic region. So did we originally. We  
24 picked 20 sites dispersed around the commonwealth. We are now  
25 stuck with 3 because we had sites plaintiffs told us --

1 THE COURT: I'm still having trouble making a fair  
2 evaluation of the statement that you purposely picked sites  
3 that were going to fall out. Now you're saying to me, yes, but  
4 the information you gave us, if you look at it, which I  
5 haven't, would lead one to conclude that they wouldn't fall  
6 out, because the plaintiffs themselves said there were leaks  
7 from this site that could have affected other locations.

8 You're telling me that for the first time. I can't  
9 verify it. I don't know if the plaintiffs agree with that.  
10 And if that really is true, I don't know why they had to fall  
11 out. I don't know why they didn't stay in.

12 MR. RICARDELLI: Your Honor, last fall, for example,  
13 we got the delineations. We didn't know until we deposed their  
14 witness in December, when we asked them is there MTBE, they  
15 said no. We said, it's in the well here, these delineations  
16 you gave us, is that well impacted by MTBE? No, it's not.

17 THE COURT: You're saying you were given incorrect  
18 information by the plaintiffs, completely incorrect  
19 information?

20 MR. RICARDELLI: I have delineations in wells that  
21 they then backed away from. Mr. Axline said at the last status  
22 conference, we delineated those as to where the MTBE would have  
23 gone if it was released from the service station. But that's  
24 not how his delineations, your CMO that required the  
25 delineations, or this process contemplated.

1           So, while the answer said these are the areas at issue  
2     from the release from that service station, these wells are  
3     threatened by the presence of MTBE, later we find out but MTBE  
4     was never at that site.

5           THE COURT: It was never at that site, how could it  
6     threaten anything?

7           MR. RICARDELLI: That's our point, your Honor.

8           THE COURT: You were given misinformation, that's what  
9     you are saying.

10          MR. RICARDELLI: Yes. That's why we are left with 3  
11     sites.

12          THE COURT: If you're given misinformation, then  
13     you're really saying there should be a sanction, it should be  
14     cut back to 3 as a sanction, misinformation should not be  
15     tolerated.

16          What is it, Mr. Axline? Did you provide  
17     misinformation?

18          MR. AXLINE: No, we did not, your Honor.

19          THE DEFENDANT: I may have to look at the actual  
20     document you provided. They said you said that the MTBE  
21     released at this location threatened that location. Now you,  
22     quote, backed off and there was no MTBE at the release site  
23     threatening anything.

24          MR. AXLINE: They picked the sites, they gave us the  
25     locations. They asked us to delineate where the MTBE from

1 those sites would go.

2 THE COURT: Would go if it was there in the first  
3 place?

4 MR. AXLINE: If it was there in the first place.

5 THE COURT: He is trying to tell me that you said it  
6 was there and that because it was there, it would travel to  
7 this or that location. You're saying the opposite.

8 MR. AXLINE: We did not go and verify their focus  
9 sites as having MTBE releases. We assumed that they picked  
10 sites that had MTBE releases.

11 THE COURT: But they picked from sites that you  
12 identified as having MTBE releases.

13 MR. AXLINE: No, that's not true.

14 THE COURT: I have to solve this, and I can't solve it  
15 at 5:20 with no documents in front of me. I must solve it. I  
16 guess, Mr. Ricardelli, if you're moving for a sanction, you're  
17 saying 7 of theirs should be mocked out so it's 3 each because  
18 they gave us misinformation, prove it to me. Write a brief or  
19 a letter attaching as exhibits what you were told, what you  
20 were shown.

21 MR. RICARDELLI: Yes.

22 THE COURT: If you have Mr. Axline saying, quote, the  
23 MTBE at this location threatens that location, then I think  
24 he's stuck. That's what he said, that's what he said.

25 MR. RICARDELLI: Thank you.

1 THE COURT: I can't tell in oral argument. I have to  
2 either have comments or transcript cites or letters or  
3 something that he does proveably.

4 MR. RICARDELLI: Understood, your Honor. We can file  
5 that in a week.

6 THE COURT: All right. What else can I do, Mr.  
7 Axline? I can't take it as representations from lawyers that  
8 he said, he didn't say.

9 MR. AXLINE: Understood, your Honor. If he is making  
10 that representation, I'm just trying to give you the context in  
11 which the delineation that he is basing this all on came up.

12 THE COURT: I understand you're saying if there was  
13 MTBE there, our experts say it would travel in this or this way  
14 and threaten this or that. But the real question is did you  
15 ever represent that it was there, so then you were predicting  
16 the delineation from the fact it was there. You're saying, no,  
17 we never said it was there. That's the issue. If you did,  
18 that's one thing. If you didn't, that's another thing. I  
19 can't solve it tonight.

20 MR. AXLINE: Could we have ten days to respond?

21 THE COURT: Yes.

22 MR. AXLINE: One other thing do I want to point out,  
23 your Honor. It is unquestioned, this is an exhibit to our  
24 reply brief that, we provided them with a list of 276 sites  
25 where we did say there is MTBE.

1 THE COURT: You mean last night?

2 MR. DEMA: No, your Honor, a year ago.

3 MR. AXLINE: They have had this for a year. They had  
4 this while they were making their trial site selections. They  
5 didn't use it.

6 THE COURT: They didn't use any of those 276?

7 MR. DEMA: No.

8 MR. RICARDELLI: This is the list I talked about that  
9 came a year after you originally ordered us to go pick sites.  
10 We were working off their site files for one year. The  
11 earlier, original deadline for us to pick trial sites was in  
12 December of 2010. That list came in in February 2011.

13 THE COURT: But that is a full year ago. Once you got  
14 it and you cross-checked it against your selections, did you  
15 wake up then and say, gee, those sites are not on this list?

16 MR. RICARDELLI: No, we didn't, your Honor, and here  
17 is why. What they did is they said here is a list of a  
18 thousand release sites that are in the case, we are only going  
19 summarize for you and do the work here as to where there are  
20 confirmed releases at branded service stations, we are not  
21 going to give you a list of the unbranded, the government-owned  
22 facilities, the third party facilities.

23 THE COURT: So this list of 276 is only branded?

24 MR. RICARDELLI: Yes. Then they are asking us, we  
25 already picked our 20 best sites, now, defendants, you go pick

1 from the next 276 best on our list, ignore the other 500 that  
2 are in the case for now and deal with it later. Of the 3 sites  
3 that we designated in this case, 2 of them are not on this  
4 list.

5 THE COURT: Because they are not branded stations.

6 MR. RICARDELLI: That's right, your Honor.

7 THE COURT: Now I understand. They never told you the  
8 276 was the extent of the case?

9 MR. RICARDELLI: That's right, your Honor. They just  
10 said these are 276 where we know there were hits and they are  
11 all branded service stations.

12 THE COURT: So they are not backing off that there are  
13 many hundreds of other sites where there are known releases but  
14 they are not branded stations?

15 MR. RICARDELLI: That's right, your Honor.

16 MR. DEMA: Your Honor, when you look through Exhibit D  
17 of our reply letter, I'm just paging through it now, with the  
18 list of 276, there are quite a number of independent service  
19 stations that are not branded. What Mr. Ricardelli is saying  
20 is factually inaccurate.

21 THE COURT: That makes it bad for you, frankly. Are  
22 you saying this is the universe, these 276 are all there is,  
23 branded and unbranded? I thought you were in a better position  
24 when you said this is just the branded list.

25 MR. DEMA: This is not the universe. This was a list



1 we gave them in February of 2011, a month before they had to  
2 pick their first 12 trial sites and a month and a half after  
3 that they picked their second 8.

4 THE COURT: I thought he said they picked in December.

5 MR. RICARDELLI: We had to pick in December, your  
6 Honor. That deadline got moved. But we had already spent a  
7 ton of time and work.

8 THE COURT: That is all history. The real question  
9 is, is this 276 the universe or not? You're saying it's not,  
10 Mr. Dema, right?

11 MR. DEMA: Correct, your Honor. The testing goes on.  
12 We give discovery as we --

13 THE COURT: Not just testing. Five minutes ago I was  
14 told this list is just the branded stations so that's why it's  
15 276, there are hundreds of other known releases that are not  
16 branded. Then you stood up and said, no, this includes  
17 unbranded. What do I make of the 276? What does it purport to  
18 be, all known releases or not?

19 MR. DEMA: It purports to be as of February 2011 known  
20 releases from service stations.

21 THE COURT: Service stations.

22 MR. DEMA: Yes.

23 THE COURT: Branded and unbranded?

24 MR. DEMA: Not a complete list of unbranded, but the  
25 ones, your Honor, that had been tested. We have already dealt

1 with the nontest, and there are nontested sites. These are  
2 tested. We actually went through the files --

3 THE COURT: What was given in February 2011? Were  
4 those all the locations throughout Puerto Rico where you had  
5 tested and knew there was a release?

6 MR. DEMA: At service stations, yes.

7 THE COURT: There wasn't another service station out  
8 there where you knew of a release and didn't put it on the  
9 list?

10 MR. DEMA: With regard to MTBE, that would be correct.  
11 In other words, there were other leaking service stations, but  
12 we did not know of MTBE, because MTBE was not particularly  
13 being tested for.

14 THE COURT: I understand. At that point in time that  
15 list of 276 was all known releases at service stations, both  
16 branded and unbranded?

17 MR. DEMA: Correct.

18 THE COURT: But only service stations?

19 MR. DEMA: Only service stations.

20 THE COURT: Some of the ones that you picked, Mr.  
21 Ricardelli, that were not on that list, are they service  
22 stations?

23 MR. RICARDELLI: They are not. Well, one of them is a  
24 service station. It's currently in our 3 sites. And it does  
25 have a confirmed release of MTBE based on the records we were

1 given.

2 THE COURT: It's not on that list?

3 MR. RICARDELLI: It's not on that list.

4 THE COURT: Do we know why? Mr. Dema just said that  
5 list was complete as of that date. Why is it not on that list,  
6 Mr. Dema?

7 MR. DEMA: I would have to check the dates. I'm  
8 talking about a list as of February 2011.

9 THE COURT: I know that. Which service station is  
10 that?

11 MR. RICARDELLI: Your Honor, let me double-check here.

12 MR. DEMA: The only service station I believe on here  
13 is Maysonet service station.

14 THE COURT: Don't look at me. He's checking.

15 MR. DEMA: I was just saying that for the record.

16 MR. RICARDELLI: Your Honor, that site is on this  
17 list. The other 2 sites that we picked are not on this list  
18 and they are not service stations.

19 THE COURT: They are not service stations. Then you  
20 knew they weren't on that list.

21 MR. RICARDELLI: I said that before. There was 1 on  
22 the list and 2 that were not.

23 THE COURT: Now I understand why you knew all along.  
24 They are not service stations.

25 MR. RICARDELLI: That's correct, your Honor.

1 THE COURT: So, what are you complaining about? I  
2 don't understand the complaint about this list. It never was  
3 anything but service stations. Now I know it included branded  
4 and unbranded, but it's only service stations.

5 MR. RICARDELLI: What I'm complaining about the list,  
6 your Honor, is that this was not, when it was delivered to us a  
7 year ago or, frankly, last night, the updated one, ever  
8 communicated to us to be this is the total universe of sites at  
9 issue in this case.

10 THE COURT: It's not. It's the service stations.

11 MR. RICARDELLI: That's correct. But we are now being  
12 criticized --

13 THE COURT: You're not learning that tonight, are you?

14 MR. RICARDELLI: No. What I'm saying is we should not  
15 be criticized last year for not just picking from this.

16 THE COURT: Right.

17 MR. RICARDELLI: I guess that's our complaint about  
18 this. Plaintiffs have suggested you guys wasted your own time  
19 because you should have just picked off the service station  
20 sites. Our point has been, frankly, that is not what this case  
21 is about, there are more sites at issue, we want to test our  
22 theories as to government-owned sites, nonbranded sites.  
23 That's why we picked.

24 We have been criticized for not picking off the 2011  
25 service station list. Then we got one yesterday that now

1 includes new sites that were never identified to us before even  
2 as early as yesterday. That's our complaint.

3 THE COURT: Obviously, you can't be limited to a list  
4 that doesn't purport to be complete. It doesn't. It's just  
5 service stations. You're welcome to pick off the list. I  
6 still don't understand why I should cut them back to 3 and why  
7 you can't add 7.

8 MR. RICARDELLI: Your Honor, one, it's the timing for  
9 us. We couldn't get it done in 30 days. We had original asked  
10 for 60, your Honor said no, do it in 30.

11 Two, it is a discovery sanction at this point. They  
12 had two years to go and pick sites around the island where they  
13 could make sure they accomplished certain things with this  
14 first trial. We are now being asked to do it quickly. We are  
15 not getting the benefit of the discovery process.

16 We have to designate just for trial. We haven't taken  
17 discovery on any of these other sites. We didn't get  
18 delineations. We don't have the benefit of that. We are just  
19 picking. Then, we are going to find out later what their  
20 theory of the case is as to the sites we are designating for  
21 trial at this point. So it is a sanction, frankly.

22 THE COURT: A trial is hardly imminent in this case.  
23 I don't think it is around the corner.

24 MR. RICARDELLI: Your Honor, then there is no  
25 finality.

1 THE COURT: There is no finality, because you didn't  
2 get it done in 30 days. You say there is Spanish language, the  
3 site files are incomplete, it's so hard. But there has to be  
4 finality.

5 MR. RICARDELLI: That's our point, your Honor, once  
6 they delineate these sites for us.

7 THE COURT: They gave you that a year ago but for a  
8 few changes on the service station sites. You have had that  
9 since February 2011. It was 276 and now it's what, 280. It's  
10 not changed very much.

11 MR. RICARDELLI: Now that this represents the  
12 universe, your Honor --

13 THE COURT: It did a year ago. The numbers have  
14 hardly changed. It was 276 then. What is it now? You told me  
15 the number before. What is it now? 280?

16 MR. DEMA: 290-something.

17 MR. RICARDELLI: 290-something.

18 THE COURT: It's a tiny change. What's the deal?  
19 It's a tiny change, going from 276 to 290. You basically had  
20 this list for a year. If you had started pick station sites in  
21 addition to whatever else you picked, you would be further  
22 along. You have had this list for a year.

23 MR. RICARDELLI: We were looking at other nonstations.

24 THE COURT: I know you were. You can't have it both  
25 ways. Pick some service sites, pick some nonservice sites, and

1 whatever you can get down in the next 30 days, that's it.  
2 There won't be anymore. If you can only add 3 more, you will  
3 have 5, they will have 10. That's it.

4 MR. RICARDELLI: Your Honor, earlier you suggested  
5 that if we did get misinformation though --

6 THE COURT: That's different. You're going to make  
7 your motion on misinformation. But this list isn't  
8 misinformation. It only purported to be service stations, and  
9 that's what it is. It doesn't purport to list nonservice  
10 station sites.

11 MR. RICARDELLI: That's correct, your Honor.

12 THE COURT: There is no misinformation there.

13 MR. RICARDELLI: That's correct.

14 THE COURT: If you made a decision not to choose  
15 service stations, that's your problem. You have an additional  
16 30 days to find 7 more sites or not. Whatever you find, that's  
17 the number.

18 MR. RICARDELLI: We can file the motion to ask that  
19 this be cut back at the same time?

20 THE COURT: Yes. You already said you were going to  
21 do it a week from today, which was March 2nd; ten days to  
22 respond, which was March 12th. You didn't tell me what you  
23 wanted for a reply, but I figure you want a week.

24 MR. RICARDELLI: A week, your Honor.

25 THE COURT: March 19th. That is solely based on if

1 you were given misinformation, there should be a preclusion  
2 sanction.

3 MR. RICARDELLI: Understood. Thank you, your Honor.

4 THE COURT: I think that took us to the end of the  
5 agenda.

6 MR. RICARDELLI: There is one more issue, your Honor,  
7 the last one for Puerto Rico.

8 THE COURT: Yes?

9 MR. RICARDELLI: We did submit two proposed orders for  
10 you. One was on the 18 sites.

11 THE COURT: We covered that.

12 MR. RICARDELLI: We did. There was one other order we  
13 gave you which related to receptors. Last year your Honor gave  
14 the plaintiffs a deadline by which they had to produce all well  
15 coordinates.

16 THE COURT: Right. You want to dismiss those wells  
17 for which they failed to produce any such information, any  
18 location information?

19 MR. RICARDELLI: That's right, your Honor. We did  
20 work over the summer with plaintiffs. We did meet and confer.  
21 This was actually the topic of a hearing with Special Master  
22 Warner last August, where we thought additional information was  
23 coming. We just want this case cleaned up once and for all.  
24 That's the list of wells where we don't think we have well  
25 coordinates where we can locate them.



1 THE COURT: They were ordered to produce coordinates  
2 and haven't produced any to date. Why shouldn't they be  
3 dismissed, Mr. Dema?

4 MR. DEMA: Because that is not an accurate  
5 foundational statement.

6 THE COURT: Meaning there is none, there is not a  
7 single well for which you haven't produced any coordinates?

8 MR. DEMA: Yes. This Court discussed this last  
9 spring.

10 THE COURT: How about you answer my question. It's  
11 late. I'm out of patience. I have a question for you. Are  
12 there some wells for which you have not produced any location  
13 coordinates? Yes or no.

14 MR. DEMA: With regard to PRASA -- PRASA is the water  
15 supply.

16 THE COURT: I can't even spell that.

17 MR. DEMA: P-R-A-S-A.

18 THE COURT: Thank you.

19 MR. DEMA: We have produced by July 31, 2011, which is  
20 your deadline, all the truthed-out GIS information.

21 THE COURT: That's great. Now could you answer my  
22 question? Are there any wells for which you have not produced  
23 any GIS coordinates, any location coordinates?

24 MR. DEMA: None that we know of with regard to PRASA.  
25 But it's not the list that the defendants have put in their

1 moving papers. That was the list that we disregarded when we  
2 went out to get, in accordance with your instructions --

3 THE COURT: Let's try again. Yes, there are many  
4 locations for which you have not produced coordinates, but you  
5 are saying you were never required to?

6 MR. DEMA: Correct.

7 THE COURT: I got it. He concedes there were many  
8 wells for which he has not produced coordinates, but he said I  
9 never ordered it, I only ordered it for PRASA sites. I don't  
10 know the answer to that, Mr. Ricardelli, do you?

11 MR. RICARDELLI: Your Honor, this did come up in the  
12 context of PRASA sites. They did produce certain well  
13 information and then later produced this list of wells to us  
14 and said here it is. Instead of going around the island, and  
15 that was actually what we discussed at that conference, and  
16 then geolocating these wells, they went and asked the USGS to  
17 give them a list of wells. So instead of the PRASA well data,  
18 they said here is a list of all the wells.

19 THE COURT: For all of Puerto Rico?

20 MR. RICARDELLI: For all of Puerto Rico. We are  
21 saying there is no way to locate these. We spent the summer  
22 asking for the well coordinates for these wells.

23 THE COURT: When you say "these," you're holding up a  
24 piece of paper.

25 MR. RICARDELLI: It's the wells that are on the list

1 in the order that we gave you, the 150. In the order attached  
2 to our letter, there's a list of wells on there.

3 THE COURT: For 150 or so that are on that list?

4 MR. RICARDELLI: Or so in which they gave us in lieu  
5 of the PRASA well coordinates that they were ordered to give  
6 us.

7 THE COURT: In lieu of? They didn't give you the  
8 coordinates?

9 MR. RICARDELLI: They said here is another list of  
10 wells and the data. That's what they gave us. We kept saying  
11 to them, are these the same wells that are being identified  
12 differently? We had lots of questions.

13 THE COURT: Do you have coordinates on those wells?

14 MR. RICARDELLI: For some, not for others, your Honor.

15 THE COURT: How many of those 150 or so do you know  
16 the have location coordinates for?

17 MR. RICARDELLI: None of these, your Honor, for the  
18 153 we don't have any coordinates for.

19 THE COURT: Why is that, Mr. Dema?

20 MR. DEMA: That is not accurate. When the  
21 commonwealth --

22 THE COURT: Wait. It cannot be accurate and not  
23 accurate. Mr. Ricardelli said no coordinates for any of those  
24 150-plus. You say not accurate. When do you think you gave  
25 them coordinates on any portion of those 150?

1 MR. DEMA: By July, which was your deadline of 2011,  
2 we gave all the GIS information for each well that PRASA owned.

3 THE COURT: You have an art now, I see, of answering  
4 my questions, and it's frustrating me terribly, Mr. Dema. I  
5 want to talk about the 150 or so on the list he's holding up as  
6 an exhibit. Do you know what list he's holding up?

7 MR. DEMA: Yes, I do.

8 THE COURT: With respect to those, he said for none of  
9 them does he have coordinates. Does he or doesn't he?

10 MR. DEMA: He does. Some of them on the list he's  
11 holding up do not exist. Last spring he held up that list and  
12 said like, for example, two of these are a quarter of mile in  
13 the Caribbean Sea. So we ignored that list and we went and got  
14 every PRASA well and produced every PRASA well coordinate by  
15 July of 2011 and gave them a new list.

16 THE COURT: Why did you give them that list if we are  
17 all supposed to ignore it, put it in the shredder, and forget  
18 you ever gave it to them? What was that list?

19 MR. DEMA: That was the previous discovery from PRASA,  
20 PRASA's own list, which proved to be inaccurate.

21 THE COURT: Mr. Ricardelli, he is saying the list you  
22 are waving around is supposed to be in the wastebasket or the  
23 shredder, it is inoperative, doesn't exist.

24 MR. RICARDELLI: Your Honor, think that is not fair.  
25 These wells exist on the island.

1 THE COURT: No, no. The list goes in the shredder.  
2 It has no relevance in this case, he is saying, throw that list  
3 out.

4 MR. RICARDELLI: Then, your Honor, I guess the way to  
5 do this is for any well that comes up in this litigation, if  
6 it's not on the list of wells that they provided coordinates  
7 for, we don't want to hear about it later. What we are trying  
8 to do here is clean this up. If we can't do it this way, if we  
9 later find out about a well, we don't want to find out about  
10 here are the files now and here are the locations. We want to  
11 clean this up.

12 THE COURT: Right. There has to be a deadline. He  
13 said he did it as of July. He gave you the coordinates on all  
14 the PRASA wells. The case is limited to that. That's it.  
15 Those are the ones he provided coordinates for, that is the  
16 limitation.

17 MR. DEMA: I understand.

18 THE COURT: Mr. Dema said, I understand. That's it.  
19 Put that old list in the shredder.

20 MR. RICARDELLI: Thank you.

21 MR. DEMA: Thank you, your Honor.

22 THE COURT: Now you need a new date. Given the amount  
23 of work you have to do, how about Friday, March 30th, same time  
24 as today. I know that doesn't make it easy to return to the  
25 West Coast, but New York is a wonderful place to spend the

1 weekend, Mr. Axline.

2 MR. RICARDELLI: That's fine for defendants, your  
3 Honor.

4 THE COURT: March 30th at 4:30.

5 MR. KAUFMAN: 4:30, your Honor?

6 THE COURT: Yes, sir. Lots of motions coming in. All  
7 page limits apply. Don't make them one word longer. Thank  
8 you.

9 (Adjourned)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25